IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.6777 OF 2004

1. Smt.Usha Kasturilal Mathuradas,)
Aged about 65 years,)

2. Shri Aswin Kasturilal Mathuradas)

3. Shri Amit Kasturilal Mathuradas)
All residing at Flat No.9B,)
5th floor, Pearl Mansion,)
(North Wing), 91,)
Queens Road, Mumbai - 400 020.)..Petitioners

Vs.

Smt. Sheetal Kailash Gupta,)
D/o.Agyasingh Kishansingh,)
residing in a portion of Flat No.9,)
5th Floor, Pearl Mansion (South Wing))
91, Queens Road, Mumbai - 400 020.)..Respondents

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Shri P.D.Madan i/b M/s.Milan Bhise & Co. for the petitioners.

Shri Devendra Sharma for the respondents.

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CORAM : R.M.S.KHANDEPARKAR, J

DATED : 4th OCTOBER, 2004.

ORAL JUDGMENT:

1. Heard the learned advocates for the parties. Perused the records. Rule. By consent, the rule is made returnable forthwith.

2. The petitioners challenge the order dated 10th

August, 2001 passed in Interim Notice No.4311 of 1999 in Interim Notice No.1912 of 1998 in R.A.D. Suit No.641 of 1998 by the Small Causes Court at Mumbai.

3. Few facts relevant for the decision are that, the predecessor of the respondent claiming to be the tenant in possession of the south west portion of the building of the petitioners filed a suit for restoration of possession under Section 6 of the Specific Reliefs Act, being the Suit No.4819 of 1970 in the City Civil Court, Mumbai. On 2nd February, 1983, the said suit was dismissed for default. The predecessor of the respondent, who had filed the said suit, expired in May 1998 leaving behind him the respondent as the sole legal heir. On 23rd January, 1989, the respondent herein filed an application in the city Civil Court at Mumbai for restoration of the said Suit No.4819 of 1970. The same was dismissed and the matter was carried in appeal being Appeal No.342 of 1989 which came up for hearing before the learned Single Judge of this Court on 23rd June, 1997 and it was disposed of by passing the following order:-

> "The Ld.Advocate for the Appellant states that in proceedings, the Small Causes Court has declared his client as tenant in respect of

the premises except two bed rooms and that his client is advised to take proceedings on title. The Ld.Advocate for the Appellant press for withdrawal of this Appeal with liberty to his client to take out proceedings on title in respect of premises involved in Suit No.4819 of 1970. The Ld.Advocate for the Respondents does not oppose the prayer. Hence, order.

ORDER

Appeal is allowed to be withdrawn with liberty to take out appropriate steps in the matter."

4. In April 1998, the respondent filed the regular civil suit based on the title being R.A.D.Suit No.641 of 1998 in the Small Causes Court, Mumbai. The petitioners took out a Notice of Motion No.4311 of 1999 challenging the maintainability of the R.A.D.suit No.641 of 1998 on the ground that the suit was barred by law of limitation. It was sought to be contested based on the provisions of law comprised under Section 14 of the Limitation Act, 1963. The trial Court after hearing the parties passed the impugned order. The petitioners preferred an appeal against the said order

which came to be dismissed on the ground that the appeal was not maintainable as the order was passed in exercise of powers under Section 9A of the Code of Civil Procedure, 1908.

5. Upon hearing the learned advocates for the parties and on perusal of the impugned order, it is apparent that the trial Court has rejected the contention sought to be raised on behalf of the petitioners solely on the ground that the issue in relation to the suit being saved under Section 14 of the Limitation Act had already been decided by this Court while disposing of the appeal No.342 of 1989 by an order dated 23rd June, 1987. The relevant finding in that regard in the impugned order reads thus:-

> "It is very much clear from the said order of the Hon’ble High Court that all the aforesaid objections and contentions raised from the side of the defendants against the application of Section 14 of the Limitation Act have been considered and thereafter only leave to file a fresh suit has been granted by the Hon’ble High Court by considering the present objections in so far as the limitation is concerned the aforesaid fact cannot be

> re-opened and agitated before this Court and with utmost respects to orders of the Hon'ble High Court, it is clear in so far as the present suit which was allowed to be filed is concerned, the period of limitation is saved. ....."

6. Plain reading of the order dated 23rd June, 1997 in the Appeal From Order No.342 of 1989 discloses that this Court had merely granted liberty to file necessary proceedings in accordance with the provisions of law which obviously would include civil suit based on title. The order does not disclose any objection on the part of the respondent for withdrawal of the said appeal with liberty to take appropriate proceedings by the respondent in the matter. However, that does not mean that this Court has decided the issue in relation to the right of the respondent to claim exclusion of any period for limitation in terms of the provisions of law comprised under Section 14 of the Limitation Act, 1963, nor the said order dated 23rd June, 1997 prohibits the petitioners from raising any issue in that regard. The alleged no objection on the part of the respondent in Appeal No.342 of 1989 for withdrawal of the appeal with liberty to initiate appropriate proceedings cannot be construed to mean

that the petitioners are estopped from raising any such issue in the suit, as there is no estoppel against the law and the plea in relation to the bar of limitation can be raised by the petitioners as a matter of right, apart from the fact that it is the duty of the Court under Section 3 of the Limitation Act to ensure that the plaintiff has filed the suit within limitation, and if not, to pass an appropriate order in that regard.

7. The observation of the trial Court about the issue in relation to the applicability of Section 14 of the Limitation Act to the matter in question had already been considered by this Court is totally contrary to the materials on record as well as contrary to the order dated 23rd June, 1997 passed in the Appeal from Order No.342 of 1989, and therefore, on that count alone the impugned order cannot be sustained. It is, therefore, apparent that the trial Court has not at all applied its mind to the issue as to whether the suit is saved under Section 14 of the Limitation Act or not, and for that purpose, it is necessary to remand the matter to the trial Court to consider the same in accordance with the provisions of law.

8. It was sought to be contended that the said issue need not be considered as the preliminary issue. At this stage, it is too premature for this court to go into the said point. It is for the trial Court to decide the same and to take appropriate decision in the matter in that regard.

9. For the reasons stated above, therefore, the petition succeeds. The impugned order is hereby quashed and set aside and the matter is remanded to the trial Court to decide the issue regarding bar of limitation raised by the petitioners afresh in accordance with the provisions of law and bearing in mind the observations made hereinabove. The rule is made absolute in above terms, with no order as to costs.

10. Authenticated copy be given to the parties.